Supreme Court, U.S.
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No. 04-1188

IN THE

Supreme Court of the United States

JERRY WAYNE WREN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the judgment should be vacated and the case remanded for resentencing, on the grounds that sentencing Petitioner pursuant to a mandatory Guidelines scheme constituted plain error in light of *U.S. v. Booker*, where (a) this case arises on direct review; and (b) at sentencing, the trial court emphasized that it was imposing the lowest sentence that the relevant Guidelines range allowed, and that it had no discretion to vary from the Guidelines range.

2. Whether the judgment below should be vacated because the panel of the Court of Appeals included a member, Hon. William Pryor, who has not been confirmed by the Senate.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Wayne Wren respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Eleventh Circuit in *U.S. v. Wren*, No. 03-13876-A.

OPINION BELOW

The opinion of the Court of Appeals, 1a-6a, is unpublished.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision below was issued on December 16, 2004.

STATEMENT OF THE CASE

Wren was convicted in the U.S. District Court for the Northern District of Alabama of attempting to possess marijuana with intent to distribute, under 21 U.S.C. §§ 846 and 841(b)(1)(B). The offense level, combined with a criminal history category I, resulted in a Guidelines range of 63 to 78 months. The Judge sentenced at the bottom of that range, stating among other things that the 63-month term was "the lowest I can give you. . . . Under the guidelines, I have no discretion as far as above or below under the facts of this particular case." (8a).

Wren appealed his conviction to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed without oral argument on December 16, 2004. The panel included Hon. William Pryor, who has not been confirmed by the Senate. The appeal did not concern sentencing issues. This Court's opinion in *U.S. v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005), did not issue until the time for seeking rehearing had run.

REASONS FOR GRANTING THE PETITION

1. Wren was sentenced during the pre-*Booker* era when the Guidelines were held to be mandatory. *See U.S. v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). This case is on direct review. Though the decision of the Court of Appeals came before this Court's decision in *Booker*, this timely petition for certiorari arrives after *Booker*, and so the *Booker* holding is applicable to this case.

The treatment of the Guidelines as mandatory was error, and the error was plain; it is now perfectly settled that the Guidelines are not mandatory. There was plain error in this regard, even though there was no enhancement based on a non-jury finding of fact. The remedial scheme of *Booker* applies not only to defendants who suffered a particular Sixth Amendment violation, but also to those who were "sentenced

under the mandatory regime without suffering a constitutional violation." *U.S. v. Hughes*, 396 F.3d 374, ___, 2005 U.S. App. LEXIS 1189, *11-12 (4th Cir. 2005).

Moreover, there is good reason to believe that the District Judge would have imposed a lesser sentence had she understood that she had the power to do so. In sentencing Wren at the bottom of the Guidelines range, the Judge emphasized that this was "the lowest I can give you" and that she had "no discretion" to go below that. (8a). While the Judge found that this sentence was "sufficient" and "long enough to get [Wren's] attention," and said in that vein that the sentence was "appropriate," she did not find that this was the lowest appropriate sentence or even the most appropriate sentence. On the contrary, her comments show the probability that she would have found a lesser sentence to be more appropriate.

The judgment should be reversed and the case remanded for resentencing. While the Circuits have adopted various approaches to deciding which sentences should be revisited because of plain *Booker* error, with the Eleventh Circuit having adopted the most stringent approach, this case would merit reconsideration under any of those approaches. Because the Judge's comments demonstrate at least a reasonable probability that she would have imposed a lower sentence had she known she had the authority to do so, this case would meet even the Eleventh Circuit's most stringent standard as set forth in *U.S. v. Rodriguez*, ___ F.3d ___, 2005 U.S. App. LEXIS 1832, *27-28 (11th Cir. 2005) (court will find reversible plain error under *Booker* only if, *inter alia*, defendant shows "a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion").

2. The question of the validity of the appointment of Hon. William Pryor is presently pending before this Court in *Evans v. Stephens* (04-828), *Miller v. U.S.* (04-38), and *Franklin v. U.S.* (04-5858). This case presents the same

question. The decision below should be vacated, if the Court grants review in one or more of those cases and holds the appointment to have been invalid.

CONCLUSION

Wren respectfully requests that the decision below be vacated and that the case be remanded for further consideration and resentencing in light of *Booker*. He further requests that if the Court grants review in one or more of the other cases raising the same issue as to the composition of the panel, this case be disposed of pursuant to the holding in such case.

Respectfully submitted,

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